FIL

IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1960

No._____

F. M. REEVES AND SONS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION OF F. M. REEVES AND SONS, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

F. M. Reeves and Sons, Inc., a corporation, Respondent in the court below, hereinafter referred to as Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on January 19, 1961.

OPINION BELOW

The Court of Appeals rendered no memorandum opinion, but its Order adjudging Petitioner in civil contempt may be found at page 60 of the Transcript of Record of this contempt proceeding, and a copy of said Order is included herein as Appendix A, p. 21.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1961. Jurisdiction of this Court is invoked under 28 *U.S.C.A.*, Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals committed reversible error in adjudging Petitioner guilty of civil contempt and in violation of that part of Respondent's enforced order which directed Petitioner to cease and desist from:

> "(a) Refusing to bargain with the Union as the exclusive representative of all of its employees in the unit found to be appropriate . . . with respect to rates of pay, wages," . . .

when the uncontradicted facts show that it was the Union that refused to bargain for and agree upon a general wage increase, unless Petitioner would agree to the Union's demands for a "Union shop" and other concessions, which demands the Union then knew Petitioner would not accede to.

2. Whether the Court of Appeals committed reversible error in adjudging Petitioner guilty of civil contempt and in violation of that part of Respondent's enforced order which directed Petitioner to cease and desist from:

> "(b) Refusing to bargain with the Union by offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain or coerce its employees in the exercise of their right to self-organization," . . .

when the uncontradicted facts show that such wage increases as were granted by Petitioner, to less than half of its employees; were given by reason of compelling business and economic necessity since the Union was refusing to bargain for and agree upon a necessary general wage increase, unless granted a "Union shop", and that such increases were not given in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or as an unlawful device to interfere with, restrain or coerce its employees in the exercise of their right of self-organization.

3. Whether the Court of Appeals committed reversible error in holding that as a matter of law the proposal alleged to have been made by Petitioner in the course of negotiations with the Union that a performance bond or other security be furnished by the Union, amounted to bargaining not in good faith, and hence constituted contempt.

4. Whether the Court of Appeals committed reversible error in not holding that the Union and the National Labor Relations Board had ratified and approved the limited wage increases set up by Petitioner, so that they are now barred from claiming that the same were unilaterally given.

STATEMENT

This is a civil contempt proceeding brought by the National Labor Relations Board (referred to herein as Respondent), against F. M. Reeves and Sons, Inc., a corporation (referred to herein as Petitioner), seeking to have Petitioner adjudged guilty of contempt in violating certain provisions of Respondent's enforced cease and desist order, the material parts of which order are hereinbefore quoted as set out in the Petition for Adjudication In Civil Contempt filed by Respondent in the Court below. (R. 16-23).

Respondent's Decision and Order appear on pages 21 to 26 of the Transcript of Record of the enforcement proceeding, nine copies of which Record were sent up with the Record herein. A copy of said Decision and Order is included herein as Appendix B, p. 23.

The facts alleged by Respondent as constituting such violation and contempt are that in August, 1960, while the parties were engaged in collective bargaining negotiations, Petitioner refused to bargain in good faith, by-passed the Union, and granted unilateral wage increases to 22 of its 52 employees in the bargaining unit. (R. 17-18).

By a later, unsworn motion for leave to amend, telegraphed from Washington directly to the Court in Denver, Colorado, Respondent sought to add the further charge that Petitioner had been guilty of not bargaining in good faith, in that in the course of bargaining negotiations Petitioner had insisted that the Union secure performance of its obligations under any contract entered into, by providing security therefor. (R. 35). Petitioner resisted said motion to amend. (R. 36-37). The Record contains no showing that said motion to amend was ever allowed, but the judgment of the lower court refers to said additional charge of bad faith bargaining as if it were in the Record. (R. 61).

By its sworn Answer (R. 25-34), supported by the Affidavit of its Personnel Manager, G. E. Pike (R. 55-59), Petitioner emphatically denied that it had in anywise violated the enforcement decree entered by the lower court on January 18, 1960, or that it was in contempt. Said Answer and Affidavit set forth in detail the facts and circumstances connected with Petitioner's negotiations with the Union in 1960, and the granting by it of wage increases to less than half of its employees, all of which are summarized as follows:

Negotiations between the parties began in March, 1960, and were still in progress at the time of the filing of this contempt proceeding on November 10, 1960; in June, 1960, the United States Government let a large contract involving a proposed expenditure of some $22,000,000.00 for the construction of a National Defense Project including 12 missile launching sites in the area around Roswell, New Mexico, at which place Petitioner has one of its plants for handling sand and gravel, and for producing ready-mixed concrete; in July, 1960, Petitioner was awarded a purchase order for furnishing all the ready-mixed concrete for said Defense Project at a cost of about $2,000,000.00; this large construction project greatly increased activity in the area and caused a sharp rise in wages, particularly among construction workers, truck drivers, and other types of employees generally hired by Petitioner; from the time the present owners acquired control and management of Petitioner in December, 1958, up to August, 1960, there had been no general wage increases at Petitioner's Roswell plant; Petitioner realized the necessity in 1960 for such wage increases because it was constantly losing its employees to competitors and others who were and are paying much higher wages than Petitioner pays; accordingly, in the course of said 1960 negotiations, Petitioner sought to get the Union to agree to a general wage increase in order that it might be able to maintain an adequate labor force, but the Union steadfastly refused so to agree, unless Petitioner would first agree to the Union's demand for a "Union shop" and other concessions, which demands the Union then knew Petitioner would not accede to; such demand by the Union for a "Union shop" as a price for allowing a general wage increase was persisted in by the Union up until after the institution of this contempt proceeding on

November 10, 1960; confronted by the absolute necessity of maintaining an adequate labor force to enable it to meet its obligations under its purchase order for delivery of material for said National Defense Project, and with the Union's refusal to consent to a general wage increase without a "Union shop", Petitioner, in early August, 1960, was compelled out of business necessity to set up certain wage increases, the same being granted in perfect good faith and affecting less than half of Petitioner's employees; at the next bargaining session, on August 16-17, 1960, Petitioner fully explained to the Union's representatives just what had been done in respect to the granting of said limited wage increases and the compelling necessity that caused them to be put into effect; not a word of dissent or objection was voiced at said meeting by the Union's representatives over the granting of said limited wage increases, and Petitioner reasonably was led to believe that they were agreeable to the Union, until receipt of notice on September 10, 1960, of the filing of the "Charge" that led to this contempt proceeding.

It was further shown in Petitioner's Answer that Respondent through its Assistant General Counsel had notified Petitioner before the hearing that the wage increases granted by Petitioner and made the basis of this contempt proceeding would be left in effect. (R. 33).

Under the foregoing facts, which are undisputed, Petitioner defended against the charge of contempt upon the following grounds: (1) Petitioner had not refused to bargain with the Union with respect to rates of pay and wages, but such refusal was by the Union itself in declining to bargain for and agree upon a general wage increase without a "Union shop"; (2) the wage increases granted by Petitioner to less than half of its employees were not

offered in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, but were given in good faith, solely as the result of economic and business necessity, since the Union would not bargain for and agree upon a general wage increase without a "Union shop"; (3) while there is no showing in this Record that Petitioner ever demanded of the Union an indemnity bond or other security as a condition precedent to the execution of a negotiated contract, nevertheless a proposal that a performance bond or security be given by the Union could not amount, as a matter of law, to bad faith bargaining on the part of Petitioner; (4) the Union and Respondent had ratified and approved said limited wage increases given by Petitioner, which fact should bar them from seeking to have Petitioner punished for putting such increases into effect.

The lower court allowed none of said defenses; ignored the fact that it was the Union itself that had refused to bargain for and agree upon a general wage increase without a "Union shop"; treated the enforced order as forbidding any and all unilateral wage increases, despite the express language thereof which forbade only those given in derogation of the Union's status *and* in an attempt to win employee allegiance from the Union; held as a matter of law that the bare proposal by Petitioner for a performance bond from the Union constituted bad faith bargaining and contempt; and took no notice of the fact that the Union and Respondent had ratified and approved the limited wage increases set up by Petitioner and now made the basis of this contempt proceeding. (R. 60-61.).

Having thus thrown out or ignored Petitioner's defenses, the lower court proceeded to impose against Petitioner a

fine of One Thousand Dollars ($1,000.00) as punishment for contempt. (R. 61; App. A, p. 21).

The Court of Appeals for the Tenth Circuit had jurisdiction of the parties hereto by reason of the filing in said Court on March 17, 1959, of a petition styled *National Labor Relations Board, Petitioner, v. F. M. Reeves and Sons, Inc., Respondent,* No. 6125, wherein said Board sought a decree enforcing its cease and desist order theretofore issued against F. M. Reeves and Sons, Inc., pursuant to 61 Stat. 136, 29 *U.S.C.A.* Secs. 151 et seq., particularly Sec. 160 (e), as amended by 72 Stat. 945. Said Petition for Enforcement Decree appears at pages 1-3 in the Transcript of Record of said enforcement proceeding, nine copies of which Record were sent up with this Record. The opinion of the lower court in said enforcement proceeding appears at pages 3-14 in the Transcript of Record of this contempt proceeding, and is published in 273 F. 2d 710 (C.A. 10th, 1959). A copy of said Opinion is included herein as Appendix C, p. 28. The Enforcement Decree entered thereon by the lower court, and with the violation of which Petitioner is now charged, appears at page 15 of the Transcript of Record of this contempt proceeding. A copy of said Enforcement Decree is included herein as Appendix D, p. 37.

REASONS FOR GRANTING THE WRIT

1. The judgment of the lower court sought to be reviewed herein, is clearly erroneous in failing to sustain Petitioner's defense based on the undisputed facts showing it was the Union itself, and not Petitioner, which had wrongfully refused to bargain and agree with respect to wages.

(a) As shown in Petitioner's sworn answer (R. 31), and in the supporting affidavit of G. E. Pike (R. 58), the Union refused to bargain for and agree upon a general wage increase unless Petitioner would agree to a "Union shop" and other Union demands which it was notified Petitioner would not consent to. Not a word in this Record controverts this plain fact, for Respondent offered no evidence whatsoever. Under such showing it was error to hold that Petitioner had refused to bargain on wages and had thus violated the enforcement decree.

(b) Said judgment of the lower court is in direct conflict on this point with decisions by other courts of appeal. Thus, where a union persisted in a demand for a union shop as a condition precedent to a contract, to which demand the employer would not accede, it was held that such position did "not justify the conclusion of a refusal to bargain", *N. L. R. B. v. Algoma, etc., Co.*, 121 F. 2d 602, 606 (C.C.A. 7th, 1941). Again, where a union would not agree to any wage increases without a contract containing a maintenance of union membership clause, contempt proceedings brought by the National Labor Relations Board charging the employer with refusing to bargain, and with unilaterally granting wage increases, were thrown out, *N. L. R. B. v. Standard Trouser Co.*, 162 F. 2d 1012 (C.C.A. 4th, 1947). Likewise, where a union refused to consider wage increases unless further concessions were made by the Respondent employer, and "it became increasingly difficult for Respondent under the existing wage scale, either to obtain new employees, or to retain those already in his employ", it was held that unilateral wage increases should be upheld, and contempt proceedings brought by the Board should be dismissed, *N. L. R. B. v. Norfolk, etc., Corp.*, 195 F. 2d 632, 637 (C.A. 4th, 1952).

2. Said judgment of the lower court is further clearly erroneous in holding Petitioner's "granting of the unilateral wage increase without consent of the Union constituted contempt" of court, when the Board's order, enforced by the lower court's decree, shows on its face that not all unilateral wage increases were forbidden thereby, but only those offered *"in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union."* (R. 16). (Emphasis supplied).

(a) The undisputed facts set out in Petitioner's sworn Answer, (R. 31), and in the supporting Affidavit of G. E. Pike, (R. 58), show that the limited wage increases here involved had to be given out of business and economic necessity, to enable Petitioner to maintain an adequate labor force whereby it could meet its obligations under its purchase order for the supply of ready-mixed concrete for a large and important National Defense Project. With the Union refusing to consider a necessary general wage increase except on terms Petitioner could not accept, no other course was open to Petitionor. These facts show affirmatively that such wage increases were not granted "in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union." The lower court mistakenly assumed that the enforced Order forbade every unilateral wage increase regardless of motive. As above shown, such is not the plain language of the enforced Order, and it is the language of that Order which must control. Petitioner cannot be held guilty under other or different language not in the Order.

(b) Said judgment of the lower court is in direct conflict on this point with decisions by other courts of appeal,

which hold that the motive and circumstances connected with the granting of unilateral wage increases must be looked to in determining the legality thereof. This is shown by the cases hereinbefore cited from the Court of Appeals for the Fourth Circuit, wherein unilateral wage increases were upheld, and contempt proceedings dismissed, when it appeared that the wage increases involved were not granted for the purpose of undermining the Union, but for other and entirely legitimate reasons. *N. L. R. B. v. Standard Trouser Co.*, supra; *N. L. R. B. v. Norfolk, etc., Co.*, supra.

Not only does this rule apply to unilateral wage increases and contempt proceedings brought therefor, but to the determination of unfair labor practices as well. Thus, in the leading case of *N.L.R.B. v. Cleveland Trust Co.*, 214 F. 2d 95 (C.A. 6th, 1954), the Court of Appeals for the Sixth Circuit directly held that unless the wage increase is given for the purpose of undermining union power, then there is no unfair labor practice. Said the court: "There is no evidence in the record that the vacation increases were determined in order to influence employees to vote against the Union . . . No evidence was adduced controverting Respondent's sworn statement that this increase was made to correct inequalities by the increase in the cost of living." p. 99. Accordingly, enforcement of the Board's order was denied.

The Cleveland case, supra, was cited and followed in *N.L.R.B. v. Newton Co.*, 236 F. 2d 438 (C.A. 5th, 1956), wherein the Court of Appeals for the Fifth Circuit overruled the Board's finding that wage increases had there been given to discourage union participation, since it appeared that "there were valid reasons other than an effort to discourage union organization" for such increases. Ac-

cordingly, as to this part of the Board's order enforcement was denied.

In *N.L.R.B. v. Norfolk etc. Corp.*, supra, the Court of Appeals for the Fourth Circuit, in upholding unilateral wage increases and dismissing contempt proceedings brought therefor, said: "There is ground for the view that the notices were posted not for the purpose of undercutting the union or impairing its usefulness, but rather in the belief that the employees . . . might remain in Respondent's employ, even in the face of higher wages elsewhere." p. 637.

The recent case of *Cone v. N.L.R.B.*, 235 F. 2d 37 (C. A. 4th, 1956; cert. den., 352 U.S. 916, 77 Sup. Ct. 214, 1 L.Ed. 2d 122.), squarely holds that motive for a unilateral wage increase is a determinative factor on the issue of its legality. In sustaining the unilateral wage increases there involved and denying enforcement of the Board's order with respect thereto, the Court quoted with approval from the Examiner's report, as follows: "the Examiner does not find that the raise was given with the destruction of the Union's majority as its premeditated goal . . . the factors pointing to a business necessity for granting the raise puts the matter of actual motive in sufficient doubt for Respondent to be entitled to the benefits thereof". As here shown, if a real doubt exists as to the motive for the granting of a unilateral wage increase, then the employer is entitled to the benefit of that doubt. In the case at bar there is not even a doubt as to the motive for the granting of the limited unilateral wage increases here involved, for the undisputed facts affirmatively show them to have been given in good faith, out of "business necessity", and with no purpose of undermining the union.

To the same effect are at least two decisions by the National Labor Relations Board itself. In *Libby, McNeil & Libby*, 65 N.L.R.B. 873, the Board held that the unilateral inauguration by an employer of an incentive plan was not *per se* illegal, unless there was proof that the increases were part of a plan to undermine the union. In *Essex Rubber Co.*, 50 N.L.R.B. 283, the Board held that wage increases granted by an employer to induce its employees to stop resigning and taking jobs elsewhere with competitors, should be sustained.

3. Said judgment of the lower court is further clearly erroneous in holding as a matter of law that the alleged proposal by Petitioner that the Union furnish a performance bond, whether made in the form of a request or a demand, "amounted to a bar to negotiating in good faith and, thereby constituted contempt of this court."

(a) As hereinbefore shown, this additional charge of bad faith bargaining was embodied in an unsworn motion for leave to amend telegraphed from Washington directly to the Court in Denver a short time before the hearing. (R. 35). Petitioner answered said motion and resisted the allowance thereof. (R. 36-37). No action by the court on this motion is shown in the Transcript though in its Order the court treated the additional charge as being in the Record. (R. 61). No order to answer said charge was ever issued or served on Petitioner. Had Petitioner been afforded proper opportunity to file a sworn answer to said allegation after the motion for leave to amend had been acted upon and allowed, it would have been a categorical denial of the contents of this last-minute, anomalous, telegraphed, unsworn pleading, for never at any time did Petitioner insist upon the Union's furnishing security for

its performance under any contract to be entered into. Even if the terms used by the lower court in its judgment (R. 61) be adopted, it must be seen that submitting a "proposal" is not "insisting", nor does making a "request" constitute "insisting". Yet the lower court finds no difficulty in holding in effect that regardless of how the subject was presented, the bare mention of a performance bond from the Union constituted, as a matter of law, bad faith bargaining and contempt of court. Such, it is respectfully submitted, cannot be the law. Congress has never written into the National Labor Relations Act any such provision making it *per se* bad faith or illegal to mention or submit a proposal for a performance bond from a union at a bargaining session, whether by way of demand or request.

(b) Said judgment of the lower court is in direct conflict with a decision rendered in the Fifth Circuit. *N.L.R.B. v. Taormina*, 244 F. 2d 197 (C.A. 5th, 1957), was a contempt proceeding instituted by the Board against an employer whom it charged with having insisted on a performance bond or other security as a condition to the entering into a contract with the Union. The record in the case and the court's opinion above cited show that such a proposal, together with another, had in fact been made, even if it had not been insisted upon as a condition precedent to a contract. Nothwithstanding this fact, the Court of Appeals for the Fifth Circuit disallowed and dismissed the contempt proceeding. Thus, the court declined to rule as a matter of law that mentioning or submitting a proposal for a performance bond from the union constituted bad faith bargaining.

4. Said judgment of the lower court is further clearly erroneous in not holding that both Respondent and the Union had accepted, ratified and approved said wage increases granted by Petitioner, and hence that they are now barred from claiming the same to have been unilaterally given.

(a) As hereinbefore stated the undisputed facts set forth in Petitioner's sworn Answer, (R. 31), show that at a meeting of Petitioner's representatives with representatives of the Union as bargaining agent for all employees, on August 16, 1960, Petitioner fully explained to the Union just what had been done with respect to the wage increases granted to a part of its employees on August 9, 1960, and further explained the reasons and necessity therefor. No dissent or objection whatever was offered or raised by the Union's representatives to the granting of said limited wage increases, so that Petitioner reasonably was led to believe that the same were accepted by the Union, and continued payment thereof. Petitioner continued in this belief until receipt, on or about September 10, 1960, of a copy of the "Charge" filed against it which led to the institution of this contempt proceeding. What brought about this change of mind on the part of the Union is not revealed.

(b) While the specific question appears not to have heretofore arisen, it must be the law that where a union, as bargaining agent for employees, agrees to a wage increase, it cannot later withdraw that acceptance, claim that the increase was unilaterally given by the employer, and procure prosecution of the employer on the ground of his having granted a unilateral wage increase.

It must also be the law that such acceptance can be given by a union either before or after the setting up

of the wage increase by the employer. If the union's assent comes before the wage increase is given, then surely such increase is not unilateral or subject to later objection on such ground. If the union's assent comes after the wage increase, by way of acceptance, ratification or approval, it must equally be true that such wage increase is not unilateral or subject to later objection on such ground. There is nothing in the National Labor Relations Act or in the case law thereunder that nullifies the basic rules of the law of ratification or of the acceptance of offers.

Such assent can be and here was, signified by silence and failure to object, when the parties were assembled for the very purpose of negotiating on wages, and were under duty to communicate with each other fairly, freely and honestly with respect to the subject of wages then under consideration. Such assent was further manifested by the conduct of the employees and their Union in accepting and collecting continued payment of such increased wages, without protest or objection. It has been specifically held that where an employer makes a unilateral wage modification, and employees show assent by conduct, such action ceases to be unilateral action by the employer, for it has thus become bilateral. *General Electric Co. v. Porter*, 208 F. 2d 805, 813 (Headnote 7) (C.A. 9th, 1953; cert. den. 347 U.S. 951, 975; 74 S. Ct. 676, 787; 98 L. Ed. 1097, 1115).

The scene here presented is nothing short of shocking to one's innate sense of justice, which shows a Union leading an employer reasonably to believe at a bargaining session that limited wage increases granted shortly theretofore were acceptable to the Union, as bargaining agent for all employees, only to have such increases used weeks

later as a basis for contempt proceedings instigated by the Union against the employer. The scene is rendered doubly shocking when it appears that the National Labor Relations Board, which acts as prosecutor on behalf of the Union in the contempt proceeding, has notified the employer that although it is to be punished for granting the wage increases in question, nevertheless the same are to remain unrevoked. (R. 33). The plain legal effect of such notification is ratification by the Board of the wage increases as granted, but nevertheless Petitioner is to be punished. This is indeed a strange spectacle in the administration of justice. Petitioner respectfully submits it is one that ought not to be allowed to stand.

CONCLUSION

1. *Burden of Proof.*

In a contempt proceeding the burden of proof rests upon the Board to establish the alleged offense. *N.L.R.B. v. Cleveland Trust Co.*, supra, at p. 99, citing numerous cases; *N.L.R.B. v. Little Rock Furniture Co.*, 123 F. 2d 868 (C.C.A. 8th, 1941).

This burden is a heavy one and calls for "clear and convincing proof" to meet it. *N.L.R.B. v. Standard Trouser Co.*, supra, at p. 1014.

This heavy burden is imposed doubtless because "contempt of court is indeed a very grave thing and we are not disposed to make strained and extreme construction of *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145, in order to spell out some theoretical and abstract violation of the Court's order, with facts such as are before us". *N.L.R.B. v. Standard Trouser Co.*, supra, at p. 1015.

Not only did Respondent in the case at bar fail to meet the burden resting upon it, but the undisputed facts affirmatively show no violation of the lower court's decree.

2. *Importance Of This Case.*

This is an important case, not alone to Petitioner which has been held in contempt of court and fined a substantial sum, but to the general public as well. It is impossible to read this Record without being impressed with the fact that here a Union has been playing a crafty game against an employer caught in a vicious situation where the Union would not allow a general wage increase, and without such wage increase the employer could not maintain an adequate labor force. Having the upper hand, the Union determined to exact its price, in the form of a "Union shop", even though it meant fighting increased wages for labor. Since the employer continued to resist, the game was played by the Union until it felt the time ripe for springing the trap, which was done by filing a "Charge" that would bring on a contempt proceeding, and at the last moment injecting into the record an allegation of bad faith bargaining based on facts which, if they existed, must have been known to the Union all along, but were withheld for use as a last-minute surprise tactic. For the protection of employers, laborers and the public at large, such abuse of the bargaining process, it is respectfully submitted, ought not to be tolerated.

For all of the foregoing reasons Petitioner respectfully submits that (1) writ of certiorari should issue to bring up for review the judgment herein of the Court of Appeals; (2) the judgment of the Court of Appeals should be reversed and set aside; (3) this contempt proceeding should be dismissed; and (4) the fine of $1,000.00 assessed

against it should be ordered repaid to it; for all of which relief Petitioner prays.

Respectfully submitted,

SCOTT TOOTHAKER
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McAllen, Texas
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PROOF OF SERVICE

I, Scott Toothaker, attorney for F. M. Reeves and Sons, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the_____day of March, 1961, I served copies of the foregoing Petition For A Writ of Certiorari on the several parties in interest, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D.C.

2. On the National Labor Relations Board, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Stuart Rothman, Esq., its Chief Counsel, at the office of said Board, Washington 25, D.C.

3. On the attorney of record for the National Labor Relations Board in the court below, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Marcel Mallet-Prevost, Esq., Assistant General Counsel, at the office of said Board, Washington 25, D.C.

SCOTT TOOTHAKER
Attorney for F. M. Reeves and Sons, Inc.
Address:
1630 North Tenth Street
McAllen, Texas

APPENDIX A

Order Adjudging Contempt

FILED
United States Court of Appeals
Tenth Circuit
January 19, 1961
Robert B. Cartwright, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before SAM G. BRATTON and JOHN C. PICKETT, United States Circuit Judges, and CARL A. HATCH, United States District Judge, assigned.

Number 6125

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

F. M. REEVES AND SONS, INC., *Respondent*

ORDER

This cause came on to be heard on petition of the National Labor Relations Board for an adjudication in civil contempt and for other relief. Allison W. Brown, Jr., appeared for the Petitioner, and Scott Toothaker appeared for Respondent, and was argued to the court.

ON CONSIDERATION WHEREOF: It is the order of the court based upon the record in the above-entitled cause and the statements of counsel; that the granting of the unilateral wage increase without consent of the

Union constituted contempt of this court; and that the performance bond proposal submitted on two occasions, whether characterized by counsel as a request or demand, amounted to a bar to negotiating in good faith and, thereby, constituted contempt of this court.

IT IS FURTHER ORDERED: That the punishment of Respondent, F. M. Reeves and Sons, Inc., for the above contempt which the court considers under the circumstances as a minimum is a fine of $1,000 for past acts of contempt.

IT IS FURTHER ORDERED: That the National Labor Relations Board's prayer for costs and for attorneys' fees in this cause be and the same is hereby denied.

Approved as to form:

/s/ ALLISON W. BROWN, JR.
Allison W. Brown, Jr.
For Petitioner.

/s/ SCOTT TOOTHAKER
Scott Toothaker
For Respondent

/s/ SAM G. BRATTON
Sam G. Bratton
U. S. Circuit Judge

/s/ JOHN C. PICKETT
John C. Pickett
United States Circuit Judge

/s/ CARL A. HATCH
Carl A. Hatch
U. S. District Judge

APPENDIX B

Decision and Order of N. L. R. B.

On February 28, 1958, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in unfair labor practices within the meaning of Section 8 (a) (5), and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, [1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

We agree with the Trial Examiner that the Respondent violated Sections 8 (a) (5) and (1) of the Act. In our opinion, the entire pattern of the Respondent's conduct demonstrates that the Respondent was not motivated by a good faith doubt of the Union's majority representative status in an appropriate unit when it declined to recognize and bargain with the Union and insisted on a Board-conducted election as condition precedent to bargaining with the Union. Thus, while it sought to defend its action on the grounds of lack of majority, we note that it did not

[1] Respondent's request for oral argument is hereby denied as the record and brief adequately set forth the facts and positions of the parties.

question the Union's majority at the time of request, but waited instead to raise the question for the first time at the hearing, and when it did so, it sought to bolster the alleged doubts with such untenable grounds [2] as: (1) the Union may have lacked a majority because 4 card signers were temporary employees; (2) the presence of representatives of the Operating Engineers at the meeting wherein the Union requested recognition raised the possibility that recognition might result in 8 (a) (2) charges; and (3) in any event, the Board would not assert jurisdiction over the Respondent. Further, in the interim and shortly after the request to bargain, in total disregard of the majority claim of the Union, the Respondent unilaterally granted a wage increase and other benefits.

From all this, we conclude that the refusal was merely a delaying tactic to gain time and take action to dissipate the Union's majority and win employee allegiance from the Union. Such conduct has heretofore been held to constitute a refusal to bargain in good faith. [3] We so find here.

Apart from the foregoing, we find, as did the Trial Examiner, that the Respondent violated Section 8 (a) (5) and (1) of the Act by unilaterally instituting wage increases and other employment benefits on September 5.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby

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[2] As to these grounds, it appears that the questioned employees were not temporary, except possibly one, and, therefore, even assuming one temporary employee, the Union still had a majority; the Operating Engineers made clear that they were not a rival union to the Teamsters; and the Board had asserted jurisdiction in F. M. Reeves and Sons, Inc., 112 NLRB 295 and the Respondent stipulated as to jurisdiction in the instant matter.

[3] A. L. Gilbert Company, 110 NLRB 2067, 2069; Harrisburg Building Units Co., Inc., 116 NLRB 334; and Traders Oil Company of Houston, 119 NLRB No. 109.

orders that Respondent, F. M. Reeves and Sons, Inc., Roswell, New Mexico, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargin with the Union as the exclusive representative of all of its employees in the unit found to be appropriate and set forth in the Intermediate Report with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Refusing to bargain with the Union, offering wage increases and other employment benefits in derogation of the Union's status as bargaining representative and in an attempt to win employee allegiance from the Union, or using any other unlawful device to interfere with, restrain or coerce its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a written agreement.

(b) Upon unconditional request, return any striker to his employment, discharging, if necessary, any replacement hired on or since September 5, 1957.

(c) Post at its plant in Roswell, New Mexico, copies of the notice attached hereto marked "Appendix".[4] Copies of the notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material,

(d) Notify the Regional Director for the Sixteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply therewith.

Dated, Washington, D.C., Oct. 13, 1958.

Boyd Leedom, *Chairman*
Stephen S. Bean, *Member*
John H. Fanning, *Member*
National Labor Relations Board

[Seal]

ORDER CORRECTING DECISION AND ORDER

On October 13, 1958, the Board issued a Decision and Order in the above-entitled proceeding in which there were inadvertent omissions.

It Is Hereby Ordered that the said Decision and Order be, and it hereby is, corrected as follows:

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[4] In the event that this Order is enforced by decree of a United States Court of Appeals there shall be substituted for the words "Pursuant To A Decision And Order" the words "Pursuant To A Decree Of The United States Court of Appeals Enforcing An Order."

1. By inserting the word "by' between the words "union," and "offering" in the first line of paragraph 1. (b) on page 3; and

2. By inserting the word "or" between the words "Union" and "in" in line 3 of the second full paragraph of the Appendix.

It Is Further Ordered that the said Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D.C., February 5, 1959.

By direction of the Board:

Frank M. Kleiler
Executive Secretary

APPENDIX C

Opinion Granting Enforcement of N. L. R. B. Order

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6125 — November Term, 1959

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

F. M. REEVES AND SONS, INC., *Respondent*

On Petition for Enforcement
of an Order of the
National Labor Relations Board

(December 17, 1959)

Fannie M. Boyls, Attorney, NLRB (Stuart Rothman, Gen. Counsel, Thomas J. McDermott, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Ass't Gen. Counsel, and Arthur C. Katims, Attorney, NLRB, with her on the brief), for Petitioner.

Scott Toothaker, McAllen, Texas, (Ewers, Toothaker, Ewers, Elick, Jones & Abbott, of counsel), for Respondent.

Before BRATTON, PICKETT and BREITENSTEIN, Circuit Judges.

PICKETT, Circuit Judge.

In this proceeding the National Labor Relations Board seeks enforcement of its order requiring F. M. Reeves and Sons, Inc., herein referred to as "respondent," to bargain

with Local Union No. 492 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in an appropriate unit, to cease and desist from unilaterally offering wage increases or other employee benefits, and also upon unconditional request to return any striking employee to his employment. The order was based on the Board's conclusion that respondent had committed an unfair labor practices proscribed by Sections 8 (a) (1) and (5) of the National Labor Relations Act, 29 U.S.C.A. §158 (a) (1) and (5).[1]

At the outset, it is necessary to consider respondent's contention that the Board's self-limiting jurisdictional standards made the assertion of jurisdiction improper in this case. To better effectuate the purposes of the Act and to promote the prompt disposition of major cases, the Board has from time to time established these standards in

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[1] The Trial Examiner found:

"Respondent is a Texas corporation with its principal office and place of business at Hobbs, Texas. In Roswell, New Mexico, it is engaged in the business of mining and supplying sand, gravel, concrete aggregate, and ready-mixed concrete to building contractors. In the 12-month period preceding the issuance of the complaint, the Respondent sold goods and materials valued in excess of $100,000 to certain contractors performing services at Walker Air Force Base, Roswell, New Mexico. All of these sales appear to have been made to subcontractors performing work on the base. About $73,000 was billed to them as a result of materials supplied under formal contract and about $39,000 on purchases arranged less formally. Considering that the Respondent in the period mentioned supplied goods and services having a value in excess of $100,000 to organizations performing work on a National Defense installation, I conclude that the Board's jurisdictional criterion in that respect is satisfied. Although the assertion was made that the period here considered is not a representative one, no substantial evidence to support that position was offered."

(Footnotes omitted). With some additions, the Board adopted the Examiner's findings, conclusions and recommendations.

order to reflect its policy of handling only cases having significant impact on interstate commerce. See *Guss v. Utah Labor Board*, 353 U.S. 1; Maytag Aircraft Corp., 110 N.L.R.B. 594. Although the Board had held in Westport Moving and Storage Co., 91 N.L.R.B. 902, that jurisdiction would be asserted over "enterprises which substantially affect the national defense," that principle was restricted in *Maytag Aircraft Corp.*, supra, wherein it was announced that thereafter jurisdiction would be asserted "over enterprises of this type only if they are engaged in providing goods or services directly related to national defense pursuant to Government contracts, including subcontracts, in the amount of $100,000 or more a year." The latter standard was in effect when the complained-of practices were committed. [2] The Trial Examiner concluded that this standard was satisfied by respondent's activity which included furnishing approximately $112,000 worth of goods and services during the year preceding the issuance of the complaint to organizations performing work on the Walker Air Force Base. When the activities of the employer have sufficient impact on interstate commerce to invoke the jurisdiction of the Board, it has, in most cases, discretionary authority in deciding the extent to which it will exercise its jurisdictional power. *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675; *Guss v. Utah Labor Board*, supra. But see *Office Employees International Union v. N. L. R. B.*, 353 U.S. 313. We find no merit to respondent's contention that sales which constitute the $112,000 amount were not such as to bring respondent within the criteria established by the Maytag case. The evidence is clear that all the material

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2. On October 2, 1958 the Board re-adopted the standard announced in the Westport case. 42 L.R.R.M. 96-97.

in question was furnished to and was used by contractors for construction required by government contracts in connection with a National defense project at Walker Air Force Base. It is immaterial that some of the material may have been used to construct recreational facilities on the base. The Board was satisfied that the jurisdictional requirements were present, and we agree.

Respondent relies on *N.L.R.B. v. Guy F. Atkinson Co.*, 9 Cir., 195 F. 2d 141, in support of its contention that the Board abused its discretion by asserting jurisdiction under conditions which did not meet the Maytag standard. This reliance is misplaced. In the Atkinson case the Board had refused, for many years, to assert jurisdiction over the operations of the employer. The Board then changed its policy and assumed jurisdiction over various unfair labor practices which had occurred before the policy change. The court refused to enforce that part of the Board's order that referred to conduct completed before the later policy was in effect. Here there was no basis for such reliance by the respondent. In a 1955 representation case, jurisdiction was asserted over this same organization, the Board having concluded that the jurisdictional facts almost identical to those in this case satisfied the Maytag standard. It was there said:

> "The Employer contends the Board should not assert jurisdiction over its Roswell operation in the light of *F. M. Reeves and Sons, Inc.*, 111 N.L.R.B. 186, wherein the Board dismissed a representation petition because the Employer's operations did not meet its jurisdiction standards. The record now before the Board shows the Employer's Roswell operation sold, under contract, materials valued at about $110,000 to contractors performing work at a military installation, the Walker Air Force Base * * *" F. M. Reeves and Sons, Inc., 112 N.L.R.B., footnote 1.

Under the particular facts of this case the Board did not act unfairly or in abuse of its discretion by asserting jurisdiction over respondent. See *N. L. R. B. v. Jones Lumber Co.*, 9 Cir., 245 F. 2d 388; *N. L. R. B. v. Parran*, 4 Cir., 237 F. 2d 373; *Optical Workers' Union v. N. L. R. B.*, 5 Cir., 229 F. 2d 170, cert. denied 351 U.S. 963; *N. L. R. B. v. Stoller*, 9 Cir., 207 F. 2d 305, cert. denied 347 U.S. 919.

With respect to the merits of the petition for enforcement, the only question is whether substantial evidence appears in the record, considered as a whole, to support the conclusion that unfair labor practices were committed. *N. L. R. B. v. Hamilton*, 10 Cir., 220 F. 2d 492; *Atlas Life Ins. Co. v. N. L. R. B.*, 10 Cir., 195 F. 2d 136; *N. L. R. B. v. Stewart*, 5 Cir., 207 F. 2d 8. The record discloses that respondent, a Texas corporation, operates a ready mixed concrete, rock, sand and gravel business in Roswell, New Mexico. On August 27, 1957 a meeting was held between management representatives Morris Trent and T. T. Sanders, and labor representatives Faro Caudill of the Teamsters, James Price of the New Mexico Building and Construction Trades Council, and two other men representing the International Union of Operating Engineers, Local 953. Caudill requested respondent's recognition of the Teamsters Local, stating that a majority of respondent's employees had designated that union to be their bargaining representative. Although Caudill had in his possession the signed membership cards, neither Sanders nor Trent inquired as to the exact number of cards or asked to examine them. While there was a conflict in the evidence as to whether the cards were actually physically offered to Sanders and Trent, it is abundantly clear that Caudill proposed that the cards be turned over to a neutral party who could then determine by referring to respond-

ent's payroll whether a majority of the employees had signed cards. This proposal was rejected. During the course of the meeting there was some discussion concerning the fact that several of the employees were temporary and it apparently was agreed that the number of employees in the appropriate bargaining unit would have to be determined without reference to those temporary employees. Because the meeting was held for the purpose of considering the Teamsters' request for recognition, some doubt was expressed by Sanders and Trent as to the reason for the presence of two representatives of the Operating Engineers Union. There was substantial evidence to the effect that the Operating Engineers Union was only interested in advancing the Teamsters' bid for recognition and that it was not a rival union. The evidence convincingly shows that the decision not to recognize or bargain with the Teamsters Union was in a large part made because of the expectancy that the Board would not assert jurisdiction over the dispute rather than because of a doubt as to the majority status of the union. On September 5, 1957, several days after the meeting, eleven of respondent's employees staged a strike protesting their employer's refusal to recognize their representative. On the first day of the strike, Trent informed the employees not participating in the strike that a 25¢ per hour wage increase was to be put into effect immediately and, in addition, promised increased vacation time and the possibility of more regular working hours.

It was stipulated by the parties that twelve employees had signed cards by August 27. In addition, the Trial Examiner found that there were twenty-four employees working for respondent on that date but that only twenty-one of them performed the type of work that would make

their inclusion in the bargaining unit appropriate.[3] On these record facts it was concluded that Sections 8(a)(5) and (1) of the National Labor Relations Act were violated both by respondent's refusal to recognize and bargain with the union and by the unilateral grant of employee benefits.

An employer's refusal to bargain is an unfair labor practice when it appears that a union has been designated by a majority of employees in an appropriate unit and that the refusal is without good faith. *N. L. R. B. v. Hamilton*, supra; *N. L. R. B. v. Clearfield Cheese Co.*, 3 Cir., 213 F. 2d 70; *N. L. R. B. v. Lunder Shoe Corp.*, 1 Cir., 211 F. 2d 284. There is little room for argument as to the evidentiary support for the first requirement. Concededly twelve employees had signed cards. Although the Trial Examiner concluded that one of the card-signers who ordinarily would have been included in the unit was a temporary employee and therefore not to be recognized in determining whether a majority existed, the proper calculation still was eleven union members out of the twenty-employee baragining unit. But respondent contends that an additional three card-signers were temporary employees. Although these three had initially worked on a temporary project for respondent, they were employed on August 27 in the performance of duties incident to the regular conduct of respondent's business. Substantial evidence shows that the required majority existed at the time when respondent refused to recognize the union.

Neither is there merit to respondent's contention that its refusal to bargain was made in good faith. There is nothing to indicate that either Trent or Sanders enter-

[3] The test for determining which of the employees were to be included in the unit was established by the Board in 1955, F. M. Reeves and Sons, Inc., 112 N.L.R.B. 295.

tained a doubt as to the existence of a majority. To the contrary, there is evidence that Sanders expressed the view that he did not doubt the truth of the assertion that a majority of the employees had designated the union. It is also argued that the knowledge that possibly four of the employees were temporary and therefore not to be considered in determining the existence of a majority furnished a basis for a good-faith doubt by respondent's representatives. This suggestion is untenable for the reason that the record fails to disclose that either Trent or Sanders knew that these four employees had signed cards or that a majority would not exist without their inclusion. The respondent also attempts to excuse itself for its failure to recognize the union and bargain with it because there were present at the meeting representatives of another union. It is urged that because of this, respondent's representatives were put in a position of not knowing which of the two unions to deal with. But whatever the relation between the two unions may have been, it is certain that the representatives of the Operating Engineers Union were making no attempt to interfere with the Teamsters' bid for recognition, and that the respondent's representatives must have known from what was said at the meeting that recognition was sought by only one union.[4]

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[4] In connection with these contentions, the Board concluded:

"We agree with the Trial Examiner that the Respondent violated Sections 8(a)(5) and (1) of the Act. In our opinion, the entire pattern of the Respondent's conduct demonstrates that the Respondent was not motivated by a good faith doubt of the Union's majority representative status in an appropriate unit when it declined to recognize and bargain with the Union and insisted on a Board conducted election as condition precedent to bargaining with the Union. Thus while it sought to defend its action on the grounds of lack of majority, we note that it did not question the Union's majority, at the time of request, but waited instead to raise the question for the first time at the hearing, and when it did so, it sought to bolster the alleged doubts with such

The Board also concluded that the unilateral offering of wage increases and other employee benefits constituted a violation of the same two sections, and part of the Board's order is directed specifically to this phase of respondent's conduct. Of course the granting of the employee benefits appears to have constituted a violation of Section 8(a)(1), and coming as it did at a time when respondent was refusing to bargain with the union, it also would seem clear that Section 8(a)(5) was thereby violated. But respondent contends that the decision to grant the benefits, or at least the wage increases, was arrived at during the preceding spring when union pressures were not being felt. However, there is adequate support from the record, considered as a whole, for the Board's inference that the announcement on the opening day of the strike that there would be increased benefits violated the two unfair labor practice sections. *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217; *May Department Stores Co. v. N. L. R. B.*, 326 U.S. 376; *N. L. R. B. v. Burton-Dixie Corp.*, 10 Cir., 210 F. 2d 199; *N. L. R. B. v. Valley Broadcasting Co.*, 6 Cir., 189 F. 2d 582; and see *N. L. R. B. v. Browning*, 10 Cir., 268 F. 2d 938.

The order will be enforced.

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untenable grounds as: (1) the Union may have lacked a majority because 4 card signers were temporary employees; (2) the presence of representatives of the Operating Engineers at the meeting wherein the Union requested recognition raised the possibility that recognition might result in 8(a)(2) charges; and (3) in any event, the Board would not assert jurisdiction over the Respondent. Further, in the interim and shorly after the request to bargain, in total disregard of the majority claim of the Union, the Respondent unilaterally granted a wage increase and other benefits.

From all this, we conclude that the refusal was merely a delaying tactic to gain time and take action to dissipate the Union's majority and win employee allegiance from the Union. Such conduct has heretofore been held to constitute a refusal to bargain in good faith. We so find here." (Footnotes omitted).

APPENDIX D

Enforcement Decree

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of
Appeals - Tenth Circuit
Jan 18 1960
Robert B Cartwright
Clerk

Number 6125

NATIONAL LABOR RELATIONS BOARD, Petitioner, §
v. §
F. M. REEVES AND SONS, INC., Respondent. §

DECREE

Before: Bratton, Pickett and Breitenstein, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent F. M. Reeves and Sons, Inc., on October 13, 1958. The Court heard argument of respective counsel on September 11, 1959, and has considered the briefs and transcript of record filed in this cause. On December 17, 1959, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and

that F. M. Reeves and Sons, Inc., its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

/s/ Sam G. Bratton
Judge, United States Court of Appeals for the Tenth Circuit

Dated: January 18, 1960.